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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH ANTHONY CASTANEDA et al., Defendants and Appellants.	C085960 (Super. Ct. No. 16FE006090)

L.R. and M.G. were ambushed and stabbed in the parking lot of an apartment complex in Sacramento. Following a jury trial, defendants Ray Anthony Ramirez, Joseph Anthony Castaneda, and Manuel Anthony Labrasca (together, defendants) were each found guilty of two counts of attempted murder (Pen. Code, §§ 187, subd. (a), 664—counts 1 and 2).[1] Castaneda was also found guilty of one count of felony evading a peace officer (Veh. Code, § 2800.2, subd. (a)—count 3). The jury found true allegations

[1] Undesignated statutory references are to the Penal Code.

that Ramirez inflicted great bodily injury on L.R., and Castaneda and Labrasca inflicted great bodily injury on M.G. The jury also found true allegations that the crimes were committed for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1).)

Defendants appeal, arguing the trial court prejudicially erred by: (1) refusing to instruct the jury on voluntary manslaughter based on heat of passion or sudden quarrel as a lesser included offense of attempted murder; (2) failing to instruct the jury on voluntary intoxication as applied to aiding and abetting the uncharged target offense of battery; and (3) failing to instruct the jury on self-defense or defense of others as applied to battery. Defendants also argue that the cumulative effect of the asserted instructional errors deprived them of due process and a fair trial. We conclude the trial court erred in failing to instruct the jury on self-defense or defense of others as applied to battery, but the error was harmless. We reject defendants' other claims of instructional error.

Ramirez separately contends the trial court abused its discretion in denying a pretrial motion to bifurcate the gang allegations and a post-trial motion to strike his prior serious felony convictions pursuant to section 1385 and *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*). We reject both contentions.

Ramirez also argues the trial court erred in imposing two 10-year gang enhancements pursuant to section 186.22, subdivision (b)(1)(C). The People concede the error. We agree that the 10-year gang enhancements must be vacated.

Finally, Ramirez argues the trial court failed to exercise discretion in selecting the upper term and imposing a consecutive sentence. We conclude that whether the trial court recognized its discretion to impose something other than the upper term or a concurrent sentence is ambiguous and remand for the limited purpose of allowing the trial court to exercise its discretion in these regards. In all other respects, the judgment is affirmed.

I. BACKGROUND

A. The Crimes

L.R. and M.G. are cousins and former members of the Red Krew Norteños, a subset of the Norteño criminal street gang. L.R. and M.G. were hanging out at L.R.'s house on the evening of March 17, 2016, St. Patrick's Day. They drank beer for several hours. L.R. also consumed marijuana and cocaine. During the course of the evening, L.R. checked Facebook and saw photographs posted by another cousin, Rosemarie. L.R. had not seen Rosemarie in some time. He reached out to her through Facebook in hopes of getting together.

Rosemarie had been celebrating St. Patrick's Day with her cousin and roommate, "Rita." Rosemarie and Rita shared an apartment with Ramirez, who was Rosemarie's boyfriend and a current member of the Red Krew Norteños.[2] Rosemarie and Rita spent several hours barhopping in Old Sacramento before meeting up with Ramirez. The trio continued barhopping and eventually found themselves at a bar called The Spot, where they would soon be joined by Castaneda and Labrasca.

Castaneda and Labrasca had also been partying that day. Castaneda, who goes by "Silencio," is a current member of the Red Krew Norteños. Labrasca is a member of a Norteño subset known as the Varrio Valley High Norteños. Castaneda and Labrasca were recent acquaintances, having met only a couple of months earlier. They started drinking beer in Labrasca's backyard in the late afternoon. They then went to a park and, later, to someone's house, where they drank more beer and some brandy. Castaneda also smoked marijuana. Castaneda then suggested they go to a bar to drink with one of his friends. Labrasca agreed, and the two made their way to The Spot, where Labrasca met Ramirez, Rosemarie, and Rita for the first time.

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[2] Rosemarie and Ramirez were married by the time of trial.

Castaneda and Labrasca arrived at the bar at approximately 10:30 p.m. According to surveillance video from the bar, they left the bar with Ramirez at 10:33 p.m., and returned approximately 20 minutes later. During this time, Ramirez, who was wearing a court-ordered GPS monitor, appears to have travelled to a location several blocks away. Defendants returned to the bar at 10:54 p.m., left the bar again at 11:11 p.m., and returned a second time at 11:17 p.m.

In the meantime, Rosemarie was communicating with L.R. via Facebook. In one such communication, at 11:11 p.m., Rosemarie informed L.R. that she was at a bar with Ray (Ramirez), Silencio (Castaneda), Manny (Labrasca), and her cousin (Rita). L.R. invited himself to hang out with the group. Eventually, a plan was made that they would meet and hang out at the apartment Rosemarie shared with Ramirez and Rita.

Rosemarie and Rita left the bar at approximately 11:22 p.m. They stopped at a liquor store, and then proceeded to their apartment. Defendants left the bar at the same time. According to GPS data, Ramirez reached the apartment by 11:32 p.m.

Rosemarie, Rita, and Ramirez occupied a second story apartment in a gated complex. The gates, which provide vehicular access to the complex, can be opened from inside the apartment by means of a "clicker" (i.e., a remote-control gate opener), allowing guests to park in an adjacent parking lot.

L.R. and M.G. pulled up to the apartment complex at approximately 11:46 p.m. L.R. called Rosemarie to ask her to open the gates. The gates opened, and L.R. and M.G. drove into the complex and parked. They got out of the car and were immediately rushed and stabbed. The assailants left the parking lot, and L.R. managed to get a gravely injured M.G. into the car. L.R. drove M.G. to the hospital, where both men were treated for stab wounds. According to GPS data, Ramirez left the apartment complex in a car at 11:51 p.m.

Deputy Steven Salmeron of the Sacramento County Sheriff's Department was on duty in a marked patrol vehicle in the early morning hours of March 18, 2016. Just after

midnight, Salmeron attempted a vehicle stop on a car on Florin Road and 55th Street. The car took off at high speed, and Salmeron gave chase. The pursuit came to an end when the car crashed into a truck.

Salmeron contacted the occupants of the car, Castaneda and Labrasca. Salmeron noticed that both men had blood stains on their shirts. He also noticed a strong smell of alcohol emitting from Castaneda. Castaneda was evaluated for driving under the influence and arrested for felony evasion. Labrasca was sent home. Subsequent DNA testing revealed that the blood on Castaneda's shirt was M.G.'s.

B. The Investigation

Detective John Sample of the Sacramento Police Department was assigned to investigate. Sample interviewed L.R. and M.G. in the hospital in the days and weeks after the attack. Over the course of two separate interviews, L.R. recounted that he arrived at the apartment complex, called Rosemarie, and waited for the gates to open. L.R. recalled that Ramirez opened the gates, and M.G. drove into the complex and parked. L.R. got out of the car on the passenger side, thinking, "I'm gonna have a good time, have a couple drinks and go home, go to work the next day." Without warning, he was attacked by three men with knives. No words were exchanged during the attack.

L.R. told Sample that he did not get a good look at the men, but "as far as [he] could see, all three of them were in on it." L.R. directed Sample's attention to the Facebook message he received from Rosemarie on the night of the attack, in which she indicated she was with Ramirez, Castaneda, and Labrasca. L.R. told Sample that he knew Ramirez and Castaneda, but did not know Labrasca.

L.R. emphasized that he could not be perceived as having cooperated in the investigation. He also emphasized the suddenness of the attack, stating, "It just happened too fast outta nowhere" and "I didn't even see it coming." He characterized the attack as an "ambush," and estimated the entire episode consumed approximately 30 seconds. L.R. told Sample, "I was fighting for my life."

Sample also interviewed M.G. in the hospital on two separate occasions. During the first interview, which took place in the intensive care unit, M.G. said he could not remember much about the night of the attack, but stated, "I wasn't really in a fighting mood but, um, think that somebody . . . said they wanted to fight so I was like all right. So I got out the car and shit I think I might have got my cousin and he's not getting out so I'm just like man, what's going on, man? Uh, uh, let me get out. Slow down and dragged him out for a second. I got out, bam. Then, uh, I was just bleeding. After that they drove me to where I had to go, you know?" A short time later, M.G. recalled, "Everything happened so fast. I don't got time to think, you just cherry up. I bring a move and then go about your way, you see you stay at home, see if anybody's gonna come around, if not."

During the trial, Sample testified that he understood M.G.'s use of the phrase "cherry up" to mean "man up" or "be tough." Sample added that he understood M.G.'s use of the phrase "bring a move" to mean "fight." He noted, however, that M.G. received pain medication during the course of the first interview, which made him groggy and hard to understand. Sample also noted that he cut the interview short as M.G. appeared to be losing consciousness.

Sample interviewed M.G. a second time some two weeks later. During the second interview, a more lucid M.G. recalled that he had been drinking with L.R. on the day of the attack. L.R. decided that he wanted to see Rosemarie, and a plan was made to meet her at a bar. The plan changed, and M.G. and L.R. found themselves driving to her apartment complex instead. M.G. had a bad feeling about meeting Rosemarie, as he had not seen her or her friends in several years. Nevertheless, he felt he should accompany L.R. rather than allow him to make the trip alone.

M.G. acknowledged that he used to associate with members of the Red Krew Norteños. He also acknowledged that he knew Ramirez and Castaneda. Nevertheless, M.G. maintained that he did not have any problems with Ramirez or Castaneda and did

not know Labrasca at all. M.G. insisted that he did not know who stabbed him and did not remember how the attack occurred.

Sample also interviewed Rosemarie and Rita. Rosemarie initially claimed she went to the bar with Ramirez and Rita only and denied meeting anyone else there. She then claimed Ramirez ran into someone he knew at the bar but denied knowing that person's name. She later acknowledged that she met Castaneda and Labrasca at the bar on the night of the attack and knew both of their names.

Rosemarie recalled that she left the bar with Rita and went to the liquor store. Rosemarie and Rita then headed for home. Rosemarie and Rita reached the apartment complex, and Rosemarie saw defendants, who had travelled in a separate car, standing outside the apartment on a balcony. She went inside and L.R. called to say that he was outside the gates. Rosemarie tried to open the gates with the clicker, without success. She then instructed Rita to open the gates. Rita left the apartment, opened the gates with the clicker, and then returned. Rosemarie and Rita then heard people yelling. Rosemarie ran to the window but could not see anything. She then heard the sound of tires screeching. According to Rosemarie, Ramirez called later that night but did not tell her what had happened.

Rita, like Rosemarie, was less than forthcoming in her initial interview with Sample. Eventually, Rita admitted that she had gone to the bar with Rosemarie and Ramirez, where they were eventually joined by Castaneda and Labrasca. She recalled that she left the bar with Rosemarie, stopped at the liquor store, and returned to the apartment complex. Like Rosemarie, she remembered seeing Ramirez and two friends hanging out on the balcony outside the apartment. Rita went inside. She left the apartment a short time later to open the gate. The men were still on the balcony when she left the apartment but had gone by the time she returned. Rita went back inside. She heard screaming and the sound of screeching tires. She admitted that she initially lied to Sample because defendants are gang members, and she did not want to be involved.

C. The Charges and Jury Trial

Defendants were arrested and charged by an amended information with two counts of attempted murder. (§§ 187, subd. (a), 664—counts 1 and 2). Castaneda was also charged with one count of felony evasion. (Veh. Code, § 2800.2, subd. (a)—count 3). As to counts 1 and 2, the amended information alleged that the offenses were committed willfully, deliberately, and with premeditation (§ 664, subd. (a)), that defendants personally used deadly weapons (knives) in the commission of the offense (§ 12022, subd. (b)(1)), personally inflicted great bodily injury on L.R. and M.G. (§ 12022.7 subd. (a)), and committed the offenses for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)). The amended information additionally alleged that Ramirez had previously suffered two serious felony convictions. Defendants entered not guilty pleas and denied the allegations.

The matter was tried to a jury in September 2017. During the trial, L.R. testified that he remembered going to the apartment complex on the night of the attack but did not remember the attack itself. L.R. also testified that he did not remember speaking with Sample. L.R. acknowledged that he was a former member of Red Krew Norteños and allowed that dropouts are looked upon with disfavor. L.R. testified that he knew Ramirez well and considered him a friend. L.R. added that he also knew Castaneda, though not as well, and did not know Labrasca at all.

M.G. testified in custody after refusing to comply with a subpoena. M.G. testified that he did not remember anything about the night of the attack, did not remember being stabbed, and did not remember speaking with Sample. M.G. acknowledged that he was a reluctant witness. M.G. also acknowledged that he knew Ramirez and was acquainted with Castaneda. M.G. testified that he did not know Labrasca.

A medical social worker from the hospital testified that she spoke with M.G. approximately one month after the attack. When asked whether he knew who stabbed him, M.G. responded, "a friend," "[n]ow an ex-friend." A hospital psychiatrist similarly

testified that he spoke to M.G. during the same time frame. According to the psychiatrist, M.G. reported that he had been stabbed by three people who were known to him.

Rosemarie testified that she went to the bar with Ramirez and Rita on the night of the attack, where they were joined by Castaneda and Labrasca. She acknowledged that L.R. contacted her over the course of the evening, seeking an invitation to get together. Rosemarie recalled that she smelled alcohol on Castaneda's breath when he drew close to her, and he lost his balance when he rose to leave. However, Rosemarie could not say whether Castaneda was drunk.

Rosemarie recalled that she left the bar with Rita and stopped at the liquor store on the way home. However, she claimed she did not know whether L.R. and M.G. were planning to come over and could not recall whether defendants were already at the apartment complex by the time she and Rita got home. Although Rosemarie remembered speaking with Sample, she claimed she could not remember telling Sample that she had made plans with L.R. to come over that night, that she saw defendants standing on the balcony when she got home, that Rita buzzed L.R. into the apartment complex, or that she heard yelling in the parking lot. Rosemarie claimed that any earlier statements she might have made to Sample about these things would have been lies.

The prosecutor confronted Rosemarie with a series of text messages exchanged with Ramirez on the morning of March 18, 2016, the day after the attack. In the first such text message, Rosemarie wrote, "Then why did you let this happen?" Ramirez replied, "It was gonna happen regardless. Bt cnt do nothin' about it." Rosemarie responded, "It didn't have to happen the way it did." Ramirez replied, "I know." During the trial, Rosemarie claimed she did not remember what she was talking about when she wrote the text messages.

Rita testified that she went to the bar with Rosemarie and Ramirez on St. Patrick's Day, but denied meeting Castaneda or Labrasca there. Rita claimed that she had been falling down drunk on the night of the attack and did not remember anything from the

time she left the bar to the time she woke up in her apartment. Although Rita acknowledged having spoken to Sample, she claimed she did not remember telling Sample that Ramirez met two friends at the bar, that she saw defendants outside the apartment when she returned from the liquor store, that she opened the gates for L.R. and M.G. with the clicker, or that she heard screams shortly thereafter.

Sample testified that he interviewed L.R., M.G., Rosemarie, and Rita as part of his investigation. Audio recordings of the interviews were played for the jury. Sample also testified that he arrested Labrasca on March 25, 2016, and noticed two straight cuts on Labrasca's right index finger.

Sample also testified as a gang expert. He described the history of the Norteños in the Sacramento area, focusing on the Red Krew Norteños and Varrio Valley High Norteños subsets. He noted that the two subsets occupy overlapping territories and regularly commit crimes together. He also noted that the Red Krew Norteños and Varrio Valley High Norteños share a common culture of using violence to instill fear and punish disrespect. Sample explained that loyalty is an important concept in gang culture, and dropouts and snitches are perceived as disloyal and may become targets for retribution.

Sample opined that Ramirez and Castaneda were active members of the Red Krew Norteños, and Labrasca was an active member of the Varrio Valley High Norteños. Sample based his opinion on defendants' gang-related tattoos and clothing, their admissions, and photographs of them displaying gang hand signs. Sample also reviewed and relied on police records documenting contacts with defendants in the company of known gang members. Based on a hypothetical with facts similar to the present case, Sample opined that a coordinated attack on former gang members by current members from two subsets would benefit the gang by enhancing its reputation for violence and sending a message about the consequences of dropping out.

Labrasca testified on his own behalf. Labrasca acknowledged that he was an active member of the Varrio Valley High Norteños. Labrasca testified that he first met

Ramirez on the night of the attack and Castaneda several months earlier. Labrasca stated that he had never heard of L.R. or M.G. prior to the night of the attack.

Labrasca testified that he spent several hours drinking with Castaneda on St. Patrick's Day, beginning with beers in his backyard at approximately 4:00 p.m., and ending with brandy in the car on the way to the bar. By the time they arrived at the bar at 10:30 p.m., Labrasca estimated that he had consumed four beers and several "belts" of brandy. Labrasca recalled that he had "a pretty good buzz" and "felt really good." However, Labrasca added, "I wouldn't say I was totally drunk or anything." Labrasca, who was 18 years old in March 2016, did not consume any additional alcohol at the bar.

Labrasca testified that Castaneda drank beer and consumed marijuana during the course of the afternoon and evening and continued to drink upon arriving at the bar. He recalled that Castaneda "was walkin' kind of—kind of tipsy, I guess." In Labrasca's opinion, Castaneda was not drunk, though it was obvious he had been drinking. By contrast, Labrasca believed that Ramirez, who was also drinking at the bar, was actually drunk. According to Labrasca, Ramirez was talking loudly and "acting kind of funny." On cross-examination, Labrasca elaborated that Ramirez was "really drunk" and "acting a fool."

After an hour or so, Castaneda asked Labrasca if he wanted to go to Ramirez's apartment to drink some more. Labrasca said yes. Defendants drove to the apartment complex and parked. They stood outside the apartment joking around and laughing at Ramirez, who was "being a fool." Nobody said anything about meeting L.R. or M.G.

After some time, Ramirez walked away from the group. Approximately one minute later, Labrasca said he heard "a commotion" with "yelling" and "arguing." Labrasca walked towards the sound and saw "two people, like, wrestling on the ground." As he drew closer, Labrasca recognized one of the combatants as Ramirez. According to Labrasca, Ramirez was "on the bottom and trying to work his way out of that."

Labrasca testified that he was trying to help Ramirez when a second man "came out of nowhere" and "looked like he wanted to fight." According to Labrasca, the second man grabbed him by the lapels and began grappling with him, trying to force him to the ground. Labrasca grappled or wrestled with the man for a short time. Although the man was stronger and bigger, Labrasca testified that he was not scared and did not feel as though he was fighting for his life. According to Labrasca, no punches were thrown, and no weapons were produced.

Labrasca grappled with the second man for approximately one minute. He then heard Castaneda say that it was time to go. Castaneda pulled Labrasca away from his adversary, and the two jogged to Castaneda's car and drove away. Once in the car, Labrasca recalled, "I kind, like, trip out, flip out. I'm, like: Who the hell were those guys? You know what I mean? What the hell just happened?" Around the same time, Labrasca noticed that his hand was bleeding. Moments later, he noticed that Deputy Salmeron's patrol vehicle was behind them.

On cross-examination, Labrasca acknowledged that he repeatedly lied to law enforcement during the course of the investigation. Among other things, Labrasca lied about what he was doing on the night of the attack and how he happened to injure his hand. Labrasca explained, "It wasn't uncommon for me to lie to the police. Like I've said, I have done it for years. I didn't like police."

Although Labrasca claimed he had been trying to distance himself from gang activities at the time of the attack, he allowed that he had been an active member of the Varrio Valley High Norteños and was not completely reformed. Labrasca confirmed that gangs look down on dropouts and commit violent acts to discourage snitching.

Labrasca acknowledged that, as a gang member, he regularly carried knives or box cutters for protection. However, he denied that he had any such weapon on the night of the attack. When asked whether he might have had a weapon on the night of the attack, but forgotten about it as a result of his drinking, Labrasca responded, "No. Because I was

not—no. I wasn't drunk to the point I blacked out. I was just feeling a really good buzz. I wouldn't say I was considered drunk."

Labrasca was emphatic that he did not see any knives on the night of the attack. He could not say how he cut his hand.

D. Jury Instructions

After the close of evidence, Castaneda's trial counsel requested that the trial court instruct the jury on voluntary manslaughter and attempted voluntary manslaughter based on provocation and the theory of sudden quarrel and heat of passion (CALCRIM No. 603). Castaneda's trial counsel argued that Labrasca's testimony and M.G.'s statement to Sample constituted substantial evidence to support such an instruction. Labrasca's trial counsel joined in the request. The trial court denied the request, stating, "I am not inclined to instruct on the issue of attempted voluntary based on heat of passion or sudden quarrel. I don't believe there is any evidence to support that."

The trial court instructed the jury with attempted murder (CALCRIM No. 600), deliberation and premeditation (CALCRIM No. 601), the lesser included offense of attempted voluntary manslaughter based on imperfect self-defense (CALCRIM No. 604), and the defense of justifiable homicide in self-defense (CALCRIM No. 505).

E. Verdict and Sentence

Defendants appeared for judgment and sentencing on November 3, 2017. Prior to sentencing, Ramirez admitted two prior serious felony convictions: (1) a juvenile adjudication for robbery (§ 211) from 2004, and (2) a conviction for participating in a criminal street gang (§ 186.22, subd. (a)) from 2012. The trial court denied Ramirez's motion to strike one or both convictions pursuant to section 1385 and *Romero*. The trial court sentenced Ramirez to an aggregate indeterminate term of 54 years to life (27 years for each count, composed of the upper term of nine years, tripled), consecutive to an aggregate determinate term of 23 years (three years for the great bodily injury enhancement, and two 10-year gang enhancements, one for each count). The trial court

sentenced Castaneda to an aggregate term of 27 years eight months, and Labrasca to an aggregate term of 23 years eight months.

Defendants filed timely notices of appeal.

II. DISCUSSION

A. Instructional Errors

Defendants contend the trial court made several errors in instructing the jury.[3] First, they contend the trial court erred in refusing to instruct the jury on attempted voluntary manslaughter based on heat of passion or sudden quarrel as a lesser included offense of attempted murder. Second, they contend the trial court erred in failing to instruct the jury on voluntary intoxication as applied to aiding and abetting the uncharged target offense of battery. Third, they contend the trial court erred in failing to instruct the jury on self-defense or defense of others as applied to battery. Finally, defendants argue that the cumulative effect of the alleged instructional errors deprived them of due process and a fair trial. We consider each contention in turn.

1. Sudden Quarrel/Heat of Passion

Defendants argue the trial court erred in failing to instruct the jury on the lesser included offense of attempted voluntary manslaughter based on heat of passion or sudden quarrel. We conclude the trial court had no duty to give such an instruction as there was no evidence from which a reasonable jury could conclude that any defendant actually acted in the heat of passion or upon a sudden quarrel.

A trial court must instruct, with or without request, on all theories of lesser included offense that are supported by substantial evidence, but not those without such evidentiary support. (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) "[T]he

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[3] Each defendant has joined in the arguments made by the others. (See California Rules of Court, rule 8.200(a)(5) [permitting a party to "join in or adopt by reference all of part of a brief in the same or a related appeal"].)

existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury. [Citations.] 'Substantial evidence' in this context is ' "evidence from which a jury composed of reasonable [persons] could . . . conclude[]" ' that the lesser offense, but not the greater, was committed." (*Ibid.*)

Attempted voluntary manslaughter due to a sudden quarrel or in the heat of passion is a lesser included offense of attempted murder. (*People v. Moye* (2009) 47 Cal.4th 537, 549 (*Moye*).) A defendant commits voluntary manslaughter or attempted voluntary manslaughter rather than murder or attempted murder if he or she intentionally and unlawfully kills or tries to kill another upon a sudden quarrel or heat of passion. (§ 192, subd. (a); *People v. Gutierrez* (2003) 112 Cal.App.4th 704, 708-709.) The passion aroused can be any violent, intense, high-wrought, or enthusiastic emotion, but it cannot be revenge. (*People v. Breverman, supra,* 19 Cal.4th at p. 163.)

Sufficient provocation is the key to reducing murder or attempted murder to voluntary manslaughter or attempted voluntary manslaughter. (*Moye, supra,* 47 Cal.4th at p. 549; *People v. Gutierrez, supra,* 112 Cal.App.4th at pp. 708-709.) " 'The provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim [citation], or be conduct reasonably believed by the defendant to have been engaged in by the victim.' " (*Moye, supra,* at pp. 549-550.) Provocation involves both an objective inquiry, and a subjective one. (*People v. Enraca* (2012) 53 Cal.4th 735, 759.) The objective inquiry asks whether the victim engaged in conduct that would " 'cause an ordinary person of average disposition to act rashly or without due deliberation or reflection.' " (*Moye, supra,* at p. 550; see also *People v. Beltran* (2013) 56 Cal.4th 935, 949 ["To be adequate, the provocation must be one that would cause an emotion so intense that an ordinary person would simply *react*, without reflection"].) The subjective inquiry asks whether the defendant was actually acting under the influence

of a strong passion when he engaged in homicidal conduct. (*Moye*, *supra*, at p. 550.) "To satisfy the subjective element of this form of voluntary manslaughter, the accused must be shown to have killed while under 'the actual influence of a strong passion' induced by such provocation." (*Ibid*.)

Defendants posit two possible bases for finding they acted upon a sudden quarrel or in the heat of passion. First, they point to M.G.'s statements to Sample in the intensive care unit. Specifically, they direct our attention to M.G.'s statement that he "wasn't really in a fighting mood," but "somebody . . . said they wanted to fight," so he "was like all right," and "got out the car." Defendants also direct our attention to M.G.'s statement that, "I don't got time to think, you just cherry up. I bring a move and then go about your way, you see you stay at home, see if anybody's gonna come around, if not." According to defendants, these statements support a finding that M.G. was a mutual combatant responding to a verbal challenge to fight, rather than the victim of a coordinated ambush.

Second, defendants point to Labrasca's testimony that he heard a "commotion" with "yelling" and "arguing," saw Ramirez wrestling on the ground with one man, and was immediately accosted by a second man, who appeared "out of nowhere" and "looked like he wanted to fight." In Labrasca's version of events, the second man suddenly grabbed him by the lapels, and began grappling with him, trying to force him to the ground. Stitching these accounts together, defendants theorize that L.R. fought with Ramirez, and M.G. suddenly attacked Labrasca, precipitating a melee in which all defendants acted upon a sudden quarrel or in the heat of passion.

We assume without deciding that a sudden physical attack of the type Labrasca described constitutes legally sufficient provocation to cause an ordinary person of average disposition to act rashly or without due deliberation or reflection. (*Moye, supra,* 47 Cal.4th at pp. 549-550; see also *People v. Elmore* (1914) 167 Cal. 205, 208-211 [reversing a conviction for second degree murder where the intoxicated victim, who was larger and stronger than the defendant, charged and struck the defendant, prompting the

defendant to stab him in the neck with a small pocketknife], disapproved on other grounds as stated in *People v. Camargo* (1955) 130 Cal.App.2d 543, 549-550.) We also assume without deciding that an attack on Labrasca could constitute legally sufficient provocation as to Ramirez and Castaneda. (*People v. Beltran, supra,* 56 Cal.4th at p. 946 [noting that " 'angry and sudden assaults upon one' " and " 'similar assaults upon one's friend who is with one at the time' " were said to constitute adequate provocation at common law].) Even so assuming, there was no evidence from which a reasonable juror could have found that any defendant actually and subjectively acted in the heat of passion in stabbing L.R. or M.G., or in aiding or abetting the stabbing of L.R. or M.G.

Here, neither Ramirez nor Castaneda testified or gave statements to law enforcement, and neither presented witnesses who testified as to their state of mind. As a result, there was no direct evidence of either defendant's subjective state of mind. (Cf. *People v. Breverman, supra,* 19 Cal.4th at pp. 150-152; *Id.* at p. 163 [the defendant's statements to police, which were corroborated by a defense witness, provided evidence that the defendant's "reason was actually obscured as the result of a strong passion"].) Circumstantial evidence of Ramirez and Castaneda's state of mind suggested they intended to benefit their gang by retaliating against former members. There was no evidence that either defendant's reason was actually obscured as the result of a strong passion aroused by provocation, or that either acted upon that required state of mind.

Labrasca testified in his own defense, providing direct evidence of his state of mind on the night of the attack. However, Labrasca's testimony belies any claim that he reacted rashly in the face of an unprovoked attack. Labrasca testified he was suddenly assaulted by a mystery man, presumably M.G. But Labrasca was clear that the ensuing scuffle, though unexpected, "wasn't scary to [him] at all." When asked why the scuffle was not scary to him, Labrasca responded, "Because I've been in fights before, and I'm used to it." Later, Labrasca elaborated, "I didn't feel like I was fighting for my life." Rather, Labrasca explained that he was merely trying to avoid being pinned to the ground

in a wrestling match in which no weapons were produced and no punches thrown. Nothing in Labrasca's testimony suggests he was acting under the influence of fear, anger, or any other violent, intense, high-wrought, or enthusiastic emotion. (*People v. Breverman, supra,* 19 Cal.4th at p. 163.)

Labrasca argues that substantial evidence that he acted in the heat of passion can be found in his testimony that, upon driving away from the scene, "I kind, like, trip out, flip out. I'm, like: Who the hell were those guys? You know what I mean? What the hell just happened?" Such testimony does not constitute substantial evidence that Labrasca's reason was actually obscured as a result of a strong passion in the circumstances of this case. On the record before us, where Labrasca specifically denied acting out of fear during the confrontation in the parking lot, and suggested no other basis for supposing that he was acting under the influence of a strong passion, we conclude no reasonable juror could have found that Labrasca's reason was obscured based on testimony that he "like, trip[ped] out, flip[ped] out," once the dust had settled and the confrontation was over. Although Labrasca's testimony was evidence that he was excited or surprised by what had happened, it was not substantial evidence that his reason was actually obscured by any intense emotion.

In the absence of substantial evidence that any defendant actually and subjectively acted in the heat of passion in stabbing L.R. or M.G., or in aiding or abetting the stabbing of L.R. or M.G., we conclude the trial court properly denied the requested instruction. Accordingly, we reject the claim of error.

2. Voluntary Intoxication

Defendants argue the trial court erred in failing to instruct the jury that it could consider voluntary intoxication in determining whether they had the mental state necessary to aid and abet the target offense of battery. We conclude there was no error, but even assuming the trial court erred, the error was harmless.

A defendant is liable as a principal in the commission of a criminal offense when, with knowledge of the unlawful purpose of the perpetrator, he or she aids and abets its commission and has the specific subjective intent to commit the offense or encourage or facilitate its commission. (*People v. Prettyman* (1996) 14 Cal.4th 248, 259, superseded by statute on other grounds as stated in *People v. Lopez* (2019) 38 Cal.App.5th 1087, 1103.) In addition to liability for an intended offense (target offense), an aider and abettor may be liable for an unintended offense that is a natural and probable consequence of the target offense. (*People v. Prettyman*, *supra,* at p. 261.) An offense is a natural and probable consequence of the target offense if a reasonable person in the defendant's position would or should have known that offense was reasonably foreseeable as a consequence of the target offense. (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 535.)

Generally, evidence of voluntary intoxication is not admissible to negate the intent required for general intent crimes such as battery. (*People v. Atkins* (2001) 25 Cal.4th 76, 81.) However, evidence of voluntary intoxication is admissible to establish whether an aider and abettor acted with knowledge of the direct perpetrator's criminal purpose and an intent to commit, encourage, or facilitate the commission of the offense. (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1123.) Accordingly, evidence of voluntary intoxication is admissible to establish whether an aider and abettor acted with that required mental state even if the target offense is a general intent crime. (*Id.* at pp. 1131-1134.)

The trial court instructed the jury on voluntary intoxication as applied to aiding and abetting attempted murder (CALCRIM No. 404), homicide crimes (CALCRIM No. 625), and felony evasion by Castaneda (CALCRIM No. 3426). Setting aside the instructions for voluntary intoxication as applied to felony evasion (which are not relevant to this analysis), the jury was instructed that voluntary intoxication could be considered in deciding whether defendants (1) acted with intent to kill, (2) acted with

premeditation and deliberation, (3) had knowledge that one of the other defendants intended to commit an attempted murder, or (4) intended to aid and abet another defendant in committing attempted murder. The jury was also instructed that a defendant could be guilty of attempted murder under the natural and probable consequences doctrine if the prosecution proved that the defendant committed battery, a coparticipant in the battery committed the crime of attempted murder, and attempted murder was the natural and probable consequence of the battery. (CALCRIM No. 403.) The jury was instructed not to consider voluntary intoxication in deciding whether attempted murder was a natural and probable consequence of battery. The jury was also instructed not to consider evidence of voluntary intoxication "for any other purpose."

Defendants argue the jury instructions were erroneous because the jury was not instructed that voluntary intoxication could be considered in deciding whether any defendant intended to assist, encourage, or facilitate the commission of the target offense of battery. To the contrary, defendants observe, the jury was instructed that it should *not* consider evidence of voluntary intoxication for this purpose. We perceive no error.

Defendants' argument assumes the jury could have found them guilty of battery because a defendant either committed battery on L.R. or M.G. himself, or because he aided another defendant's battery on L.R. or M.G. Defendants' view of aiding and abetting liability is supported by CALCRIM No. 401 and established case law. (*People v. Prettyman, supra,* 14 Cal.4th at p. 267.) But CALCRIM No. 403—the natural and probable consequences instruction given here—effectively eliminates the possibility that defendants were found guilty of battery based on aiding and abetting. CALCRIM No. 403 requires the defendant to have directly committed the target offense and, during the commission of the target offense, a coparticipant in the target offense commits the non-target offense. As applied to the facts of this case, CALCRIM No. 403 required the jury to find that a defendant was a direct perpetrator of the target offense of battery on L.R. or M.G., and during that battery, a coparticipant committed the non-target offense of

attempted murder. The jury did not have any occasion to consider whether any defendant intended to assist, encourage, or facilitate the commission of the target offense of battery, as only a direct perpetrator could be guilty of attempted murder as a natural and probable consequence of battery under CALCRIM No. 403. It was therefore unnecessary to instruct the jury that voluntary intoxication could be considered in deciding whether any defendant intended to assist, encourage, or facilitate the commission of a battery. The trial court had no sua sponte duty to give an unnecessary instruction. (*People v. Owen* (1991) 226 Cal.App.3d 996, 1004-1005 ["the court is required to instruct sua sponte only on general principles which are necessary for the jury's understanding of the case. It need not instruct on specific points or special theories which might be applicable to a particular case, absent a request for such an instruction"].)

But even assuming *arguendo* that the instructions were incomplete, we would conclude the error was harmless. We apply the *Watson* standard of prejudice (*People v. Watson* (1956) 46 Cal.2d 818, 836), as any error in instructing the jury on voluntary intoxication "would have the effect of excluding defense evidence and is thus subject to the usual standard for state law error: 'the court must reverse only if it also finds a reasonable probability the error affected the verdict adversely to defendant.' " (*People v. Mendoza*, *supra*, 18 Cal.4th at pp. 1134-1135; see also *People v. Pearson* (2012) 53 Cal.4th 306, 325 [appellate courts "apply the 'reasonable probability' test of prejudice to the [trial] court's failure to give a legally correct pinpoint instruction" on voluntary intoxication].) Although substantial evidence was presented that all defendants had been drinking on St. Patrick's Day, there was no evidence that any defendant was unable to form the intent to aid and abet the target offense of battery. (Cf. *People v. Johnson* (2016) 243 Cal.App.4th 1247, 1291 [alleged failure to give complete instructions on voluntary intoxication was not prejudicial where there was no evidence that the defendant's ingestion of alcohol and drugs on the day of the murder affected his ability to

understand that a coparticipant intended to commit robbery or kidnapping, or his ability to form an intent to aid and abet coparticipant in committing robbery or kidnapping].) On the record before us, we see no reasonable probability that any defendant would have obtained a more favorable verdict had the jury been instructed that it could consider voluntary intoxication in deciding whether he intended to assist, encourage, or facilitate the target offense of battery. Accordingly, we reject the claim of error.

3. Self-Defense

As previously discussed, the trial court instructed the jury that to prove aiding and abetting liability under the natural and probable consequences doctrine, the prosecution had to prove, among other things, that the defendant was guilty of battery. Defendants contend the trial court erred in failing to instruct the jury that battery required the prosecution to disprove self-defense and defense of another, and by failing to instruct the jury on self-defense and defense of another in the context of a non-homicide crime. We agree with defendants that the trial court erred as to Labrasca, but conclude the error was harmless beyond a reasonable doubt.

As noted, the trial court instructed the jury with CALCRIM No. 403 that a defendant could be guilty under the natural and probable consequences theory if he was found to have committed the target offense of battery. The trial court did not instruct the jury with CALCRIM No. 960, the standard instruction for simple battery. Instead, the trial court modified CALCRIM No. 403, to provide, in part: "A person commits a battery if he willfully and unlawfully touches another person in a harmful or offensive manner." (See § 242 ["A battery is any willful and unlawful use of force or violence upon the person of another"].) The trial court did not inform the jury that the prosecution, to prove battery, must show that the defendant did not act in self-defense or in defense of another (CALCRIM No. 960), and did not address the relevant considerations for self-defense or defense of another as they relate to battery (CALCRIM No. 3470), as opposed to attempted murder or attempted voluntary manslaughter (CALCRIM Nos. 505 and 604).

A self-defense instruction is required where there is substantial evidence the defendant reasonably believed he was in imminent danger of suffering bodily injury or of being touched unlawfully, he reasonably believed immediate use of force was necessary to defend against the danger, and he used no more force than reasonably necessary. (See *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082-1083; CALCRIM No. 3470.) Here, there was no evidence, let alone substantial evidence, from which a reasonable jury could conclude that Ramirez or Castaneda committed a battery in self-defense or in defense of another. We therefore conclude that neither Ramirez nor Castaneda was entitled to an instruction on self-defense or defense of another as they relate to battery, but even assuming they were, the failure to give one was harmless.

Labrasca, however, presents a different question. As previously discussed, Labrasca testified that he heard a commotion and went to investigate. He saw Ramirez and another man (presumably L.R.) wrestling on the ground.[4] Labrasca was trying to help Ramirez when another man (presumably M.G.) "came out of nowhere" and grabbed him by the lapels. The man then began grappling with Labrasca, trying to force him to the ground. Labrasca and the man grappled or wrestled for approximately one minute, until Castaneda came and told Labrasca that it was time to go. Labrasca's testimony constitutes substantial evidence that he acted in self-defense and therefore, did not commit a battery. (§§ 692, subd. (1), 693, subd. (1) [a party about to be injured is entitled

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[4] Ramirez argues that Labrasca's testimony constitutes substantial evidence that he, Ramirez, acted in self-defense. Specifically, he argues that Labrasca's testimony supports an inference that the first man (L.R.) attacked him, while the second man (M.G.) acted as backup. However, Labrasca's testimony does not shed any light on how the altercation between Ramirez and the first man (L.R.) began. To the contrary, Labrasca testified the altercation was already underway by the time he arrived. Thus, Labrasca's testimony does not support Ramirez's self-defense theory, which amounts to mere speculation. (*People v. Crew* (2003) 31 Cal.4th 822, 835 [speculation is not substantial evidence].)

to make lawful resistance sufficient to prevent an offense against his person]; *People v. Duchon* (1958) 165 Cal.App.2d 690, 693 [a battery cannot be committed by acts done in self-defense].) As to Labrasca, the trial court should have instructed the jury on the requirements for self-defense and defense of another as they relate to battery. (CALCRIM No. 3470.) The trial court's failure to do so meant that the jury could have improperly found Labrasca guilty of battery based on evidence that he wrestled or grappled with M.G. in self-defense, thereby establishing a basis for aiding and abetting liability for attempted murder under the natural and probable causes doctrine. Such a result would have been manifestly unjust. The record establishes that a properly instructed jury would have reached the same verdict.

An instructional omission is "harmless beyond a reasonable doubt under circumstances in which 'the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions. In such cases the issue should not be deemed to have been removed from the jury's consideration since it has been resolved in another context, and there can be no prejudice to the defendant . . . .' " (*People v. Wright* (2006) 40 Cal.4th 81, 98.)[5]

The jury's true finding on the great bodily injury allegation necessarily resolved any claim of self-defense for the uncharged battery adversely to Labrasca. "Self-defense allows the use of reasonable force to resist the unlawful application of force or unlawful touching." (*People v. Clark* (2011) 201 Cal.App.4th 235, 250.) A defendant's use of force must be proportionate to the threat, and the use of excessive force destroys the

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[5] Because we conclude the error was "harmless beyond a reasonable doubt" under the standard applicable to federal constitutional errors (*Chapman v. California* (1967) 386 U.S. 18, 24), we need not decide whether the less stringent *Watson* standard applies (*People v. Watson, supra,* 46 Cal.2d at p. 836). (See *People v. Salas* (2006) 37 Cal.4th 967, 984 ["We have not yet determined what test of prejudice applies to the failure to instruct on an affirmative defense"].)

justification of self-defense. (See *People v. Hardin* (2000) 85 Cal.App.4th 625, 629.) Here, the jury found that Labrasca personally inflicted great bodily injury on M.G. Had the jury believed that Labrasca acted in reasonable self-defense by wrestling or grappling with M.G., it would not have concluded that Labrasca personally inflicted great bodily injury on M.G. In finding the great bodily injury allegation true, the jury either rejected Labrasca's self-defense theory altogether, or concluded that Labrasca's use of force in what was described as a wrestling contest without weapons was out of proportion to any threat M.G. may have posed. (*People v. Hardin, supra,* at pp. 629-630 [force likely to cause great bodily injury may be used only to repel an attack which is in itself deadly or likely to cause great bodily injury].) Either way, the jury necessarily rejected any claim of self-defense as to the uncharged battery. To the extent the jury relied on the natural and probable causes doctrine, the trial court's failure to give instructions on self-defense and defense of another as applied to the target offense of battery was harmless beyond a reasonable doubt. (Cf. *People v. Koontz* (2002) 27 Cal.4th 1041, 1086-1087 [any error in failing to instruct the jury on the definition of manslaughter and the doctrine of unreasonable self-defense was harmless, as the jury necessarily rejected the unreasonable self-defense theory in returning a true finding on a robbery special-circumstance allegation].) We therefore reject the claim of error.

4. Cumulative Error

Finally, defendants argue that the cumulative effect of the claimed instructional errors deprived them of due process and a fair trial. We have carefully reviewed the record and found only one such error, related to the trial court's failure to instruct the jury on self-defense and defense of another as applied to the uncharged target offense of battery. As discussed above, we have concluded that error was harmless. Because we have found only one harmless error, there is nothing to cumulate. Accordingly, we reject defendants' cumulative error claim. (See *People v. Duff* (2014) 58 Cal.4th 527, 562 [rejecting cumulative error claim where, as here, there was "nothing to cumulate"].)

B. Ramirez's Separate Contentions

Ramirez separately contends: (1) the trial court abused its discretion in denying a pretrial motion to bifurcate the gang allegations ; (2) the trial court abused its discretion in denying his *Romero* motion ; (3) the trial court erred in imposing two 10-year gang enhancements pursuant to section 186.22, subdivision (b)(1)(C); and (4) the trial court failed to exercise discretion in selecting the upper term and imposing consecutive terms. We consider these contentions *seriatim*.

1. Denial of Motion to Bifurcate Gang Allegations

Ramirez contends the trial court erred in refusing to bifurcate the gang-enhancement allegations, thereby depriving him of a fair trial. We disagree.

Prior to trial, counsel for Castaneda moved to bifurcate the gang evidence on the grounds that it was more prejudicial than probative. Counsel for Ramirez and Labrasca joined in the motion. The prosecution opposed the motion, arguing the gang evidence was relevant to identity, motive, and intent. The trial court denied the motion, reasoning that the gang allegations were "inseparable" from the charged offenses, and therefore, "there really would be no utility in granting the motion."

A trial court must limit the introduction of evidence and argument to relevant and material matters. (§ 1044.) To carry out its duties, the trial court has discretion to bifurcate trial issues, including enhancements, to avoid the risk of undue prejudice to the defendant. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.) "But evidence of gang membership is often relevant to, and admissible regarding, the charged offense. Evidence of the defendant's gang affiliation—including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime. [Citations.] To the

extent the evidence supporting the gang enhancement would be admissible at a trial of guilt, any inference of prejudice would be dispelled, and bifurcation would not be necessary." (*Id.* at pp. 1049-1050.) Bifurcation is required only when the defendant can " 'clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried.' " (*Id.* at p. 1050.) Denial of a motion to bifurcate gang allegations from trial on substantive offenses is reviewed for abuse of discretion. (*Ibid.*)

Here, much of the gang evidence was relevant to the charged offenses in that it helped the jury to understand defendants' motivations and evaluate the credibility of the witnesses. The trial court limited the jury's use of the gang evidence by instructing the jury that the evidence could not be used to prove that defendants were "person[s] of bad character or that [they had] a disposition to commit crime." And none of the gang evidence was likely to convince the jury to convict Ramirez on the charged crimes regardless of his guilt. Eyewitness testimony and circumstantial evidence showed that Ramirez participated in a coordinated attack on two former gang members, leaving one close to death. The gang evidence was so mild in comparison that we cannot conclude it " 'rendered the trial "so 'arbitrary and fundamentally unfair' that it violated due process." ' " (*People v. Albarran* (2007) 149 Cal.App.4th 214, 230.) We therefore conclude that the evidence admitted to gang enhancements was not so minimally probative on the charged offenses or so inflammatory "that it threatened to sway the jury to convict regardless of defendants' actual guilt." (*People v. Hernandez, supra,* 33 Cal.4th at p. 1051.) The trial court acted within its discretion in denying bifurcation.

2. Denial of Romero Motion

Ramirez argues the trial court abused its discretion in denying his *Romero* motion. Again, we disagree.

Under section 1385, subdivision (a), a trial court may on its own motion order an action dismissed "in furtherance of justice." In *Romero,* our Supreme Court held that section 1385, subdivision (a) allows "a court acting on its own motion to strike prior

felony conviction allegations in cases brought under the Three Strikes law." (*Romero, supra,* 13 Cal.4th at pp. 529-530.) In deciding whether striking a prior felony conviction allegation would be in furtherance of justice, the trial court and reviewing court "must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

We review rulings regarding motions to strike prior felony convictions pursuant to a deferential abuse of discretion standard. (*People v. Williams, supra,* 17 Cal.4th at p. 162; *People v. Myers* (1999) 69 Cal.App.4th 305, 309.) The defendant bears the burden of demonstrating that the trial court's decision is unreasonable. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978 [presumption that trial court acts to achieve lawful sentencing objectives].) We do not substitute our judgment for that of the trial court. "It is not enough to show that reasonable people might disagree about whether to strike one or more of [the defendant's] prior convictions. (*People v. Myers, supra,* at p. 310.)

Ramirez argues the trial court failed to consider the nature and circumstances of the current offenses, his criminal record, or his prospects for rehabilitation. Specifically, he argues that that the current offenses "reveal nothing about [his] long-term prospects for rehabilitation, especially in light of his status as the father of two children, ages 12 and 13 years." He also observes that his prior felony convictions are remote in time, nonviolent, and otherwise distinguishable. Ramirez does not come close to demonstrating an abuse of discretion.

The record clearly shows that the trial court was aware of its discretion and appropriately considered the factors described in *People v. Williams, supra,* 17 Cal.4th

148. The trial court specifically considered the nature and circumstances of the current offense, noting that they involved "great violence" and were "largely unprovoked, as far as the [c]ourt can tell." The trial court also considered Ramirez's criminal history, observing that, throughout his adult life, Ramirez "has engaged in almost continuous criminal conduct, and in fact, has received prison commitments on three of those offenses, including five years in 2012."

The trial court also specifically considered Ramirez's prospects for rehabilitation and his conduct while in custody awaiting trial in the current case. The trial court observed: "The defendant has engaged in conduct while in custody that is not indicative of rehabilitation. The fact that he is previously convicted involving the membership in a criminal street gang and served time on that proved to have little deterrent value. [¶] There's nothing to indicate, either in the defendant's record or his behavior in custody or his conduct on probation or parole, that would indicate that he's amenable to rehabilitative services."

The denial of the *Romero* motion was neither irrational nor arbitrary and did not constitute an abuse of discretion.

3. Gang Enhancements

Ramirez argues, and the People concede, that his sentence must be modified to delete the 10-year gang enhancements. We agree.

Under *People v. Williams* (2014) 227 Cal.App.4th 733, 744-745, a violent felony punishable by a life term of imprisonment under the three strikes law is not subject to the 10-year enhancement under section 186.22, subdivision (b)(1)(C). The trial court here imposed 10-year gang enhancements under this statute for each of the attempted murder convictions Accordingly, the judgment as to Ramirez must be modified to vacate the 10-year gang enhancements on counts 1 and 2.

4. Failure to Exercise Sentencing Discretion

Finally, Ramirez argues that remand for resentencing is required because the trial court failed to exercise discretion in selecting the upper term and imposing a consecutive sentence. The People respond Ramirez forfeited his claims by failing to raise them in the trial court. Although failure to timely raise a sentencing issue in the trial court forfeits the issue for appellate review (*People v. Garcia* (2010) 185 Cal.App.4th 1203, 1218), we may exercise our discretion to consider the issue (*People v. Williams*, *supra*, 17 Cal.4th at p. 161, fn. 6), and do so here.

Following the denial of the *Romero* motion, Ramirez's counsel urged the court to consider not to "invoke the maximum and run the second count concurrent." The following colloquy occurred:

"[TRIAL COURT]: Let me ask you. I mean, is there anything for me to do? I mean, do I have any discretion at this point, other than what I've indicated? There's—the gang allegation and the GBI are not—are defined terms.

"[COUNSEL]: Well, the two strikes law taking over it takes out the middle term and high term out of the—

"[TRIAL COURT]: That's right. The only thing I can impose is what is proscribed by law."

The trial court then sentenced Ramirez to a consecutive sentence of 27 years (triple the upper term) on counts 1 and 2, stating: "The two counts are to be served consecutive to one another in light of the fact this case involved separate victims."

Ramirez contends the trial court was not aware of its discretion in deciding whether to select the upper term or impose a consecutive sentence and asks us to remand for resentencing to allow the court to exercise its discretion. The People agree with Ramirez that the trial court had discretion to select the midterm (§ 667, subd. (e)(2)(A); and see *People v. Keelen* (1998) 62 Cal.App.4th 813, 820) and impose a concurrent sentence (*People v. Deloza* (1998) 18 Cal.4th 585, 595), but

disagree as to whether the court was aware of its discretion. We conclude that the record is ambiguous on this point.

"Defendants are entitled to sentencing decisions made in the exercise of the 'informed discretion' of the sentencing court. [Citations.] A court that is unaware of the scope of its discretionary powers can no more exercise that 'informed discretion' than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant's record." (*People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8.)

Here, the trial court's comments indicate that the court believed its discretion to be limited as to the selection of the upper term, the imposition of a consecutive sentence, or both. Although we generally presume the trial court understood the applicable law and the scope of its sentencing discretion (*People v. Galvez* (2011) 195 Cal.App.4th 1253, 1264), here, the court's comments suggest a misapprehension, the dimensions of which are unclear. Neither of the parties corrected the trial court's misapprehension, and there was no further discussion of the possibility of selecting something other than the upper term or running the terms consecutively. As a result, we cannot say with confidence that the trial court exercised its discretion with respect to either sentencing choice. Because we cannot determine whether the trial court understood that it had discretion to (1) sentence Ramirez to something other than the upper term, which triggered application of option one of the three strikes sentencing scheme (§ 667, subd. (e)(2)(A)(i)), instead of another term in the triad, which would require the court to consider whether options two or three apply (§ 667, subd. (e)(2)(A)(ii)/(iii)), and (2) impose a concurrent term, we remand for the limited purpose of allowing the court to exercise its discretion in these regards. We express no opinion as to how the trial court should exercise its discretion.

III. DISPOSITION

The judgment of conviction is affirmed. With respect to Ramirez only, the sentence is vacated and the matter is remanded to the trial court to: (1) strike the gang enhancements; (2) exercise its discretion whether to select the upper term or something other than the upper term, and then impose the appropriate sentence under section 667, subd. (e)(2)(A); (3) exercise discretion whether to impose a concurrent or consecutive sentence; and (4) resentence Ramirez accordingly.

The trial court is directed to prepare an amended abstract of judgment reflecting its changes to Ramirez's sentence and forward a copy to the Department of Corrections and Rehabilitation.

/S/

RENNER, J.

We concur:

/S/

HULL, Acting P. J.

/S/

MURRAY, J.